IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. 82-5853

EDWARD B. FITZGERALD,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI

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OPINION BELOW

The opinion of the Supreme Court of Virginia is recorded at 223 Va. 615, 292 S.E.2d 798 (1982).

JURISDICTION

The Petitioner claims that jurisdiction is founded upon 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

I. Whether The Trial Court Properly Instructed The Jury Regarding The Aggravating Factor(s) That It Was Required To Find In Order To Sentence Petitioner To Death?

II. Whether The Evidence Was Sufficient To Establish That Petitioner Had Raped The Decedent Prior To Or During The Commission Of The Capital Murder?

III. Whether The Trial Court Adequately Discharged Its Duties Regarding The Fact That One Of Petitioner's Two Trial Attorneys Had A Wife Who Was Employed In The Prosecutor's Office During The Trial?

STATEMENT OF THE CASE

On November 13, 1980, Patricia Cubbage, Donald Henn, Angelia Robinson, Daniel Johnson, and Petitioner drank beer and smoked marijuana at Petitioner's house. Later that evening, Petitioner and Johnson went to Sandston to see a friend who was apparently having trouble with a would-be intruder. They took with them a machete after Petitioner stated that he anticipated difficulties in Sandston. (App. 64-65.)

When they arrived there, they observed no intruder. Subsequently, they entered the apartment of the tenants, David and Lenore Bradley. After visiting with them for several hours, the two men drove back in Johnson's automobile to Richmond. Petitioner started to complain about how Patricia Cubbage had "ripped him off." (App. 170.) He then suggested to Johnson that they go to Henn's home where they could break in and steal drugs. Cubbage was temporarily living with Henn and his wife, who was away on a business

trip. Henn and Robinson had left Cubbage alone at the house to go to Richmond. (App. 171.)

Fitzgerald and Johnson then parked their vehicle near the home and broke in through a back window. Johnson, who remained downstairs while Petitioner went upstairs then heard Cubbage ask Petitioner why he was there. After hearing what sounded like a small scream, Johnson went upstairs, and saw Cubbage sitting on the floor nude and with a cut over her left eye. (App. 174-75.) After they put her on the bed, Petitioner said: "I have always heard that you were a good fuck and a good piece of ass and I'm going to find out." (App. 176-77.) As Fitzgerald began to remove his pants, Johnson turned his head away. He heard Cubbage say that she was on her period and had a tampon within her. Johnson then looked around and saw the tampon lying on the side of the bed; he believed that Petitioner had pulled it out of her. (App. 177.) When Johnson again turned his head away, he heard Cubbage "breathing hard...heard the bed squeaking." (App. 178.) Petitioner then pulled up his pants and said to Cubbage: "You're not worth a fuck. You're nothing but a no good for nothing slut." (App. 178.)

Petitioner then hit Cubbage several times with the machete. He forced Johnson to accompany her to the automobile so that he could take her to see someone that she "had always fucked over." (App. 179.) As Johnson helped her go

outside, Petitioner went back into her bedroom and picked up her purse. (App. 181.)

Petitioner then directed Johnson to a nearby wooded area. Petitioner, who had removed Cubbage's clothes during the ride, then forced her to attempt to orally sodomize him; she had to stop, however, because of the amount of blood in her mouth. (App. 185.) After he hit her with the machete and knocked her to her knees, she looked up "at the sky and she said: God, please just blow my brains out and get it over with--like this." (App. 186.)

Petitioner then stabbed her numerous times over her entire body with the machete and also a knife that he carried in his wallet. During this carnage, he placed the machete in her vagina and then in her rectum and moved it up and down as if to simulate sexual intercourse. (App. 187-88.) A subsequent medical examination revealed that decedent had been stabbed or cut at least 184 times. (App. 365-66.) The cause of death was her loss of blood; in fact, virtually no blood remained in the vessels of the body. (App. 375-76.) The medical examiner further opined that all of the wounds had occurred before Cubbage's death. (App. 376.)

Fitzgerald and Johnson then went to a dumping area of a nearby apartment complex. After Petitioner rummaged through decedent's purse, he threw it out and they then drove to Petitioner's home. There, they put their bloodied clothes in the washing machine. Petitioner placed an intricate tattoo

on Johnson's left arm after telling him that he was a "one percenter" which meant that he was "a total outlaw and had no respect for the law whatsoever and didn't care for anyone but himself." (App. 195-96.)

A Chesterfield County police officer who was on his way to Henn's residence to investigate the apparent crimes that had been reported by Henn and Robinson upon their return to his home saw and recognized Johnson's automobile as it was leaving the wooded area. (App. 265-7.) Upon being advised by Henn and Robinson that Petitioner and Johnson had been with Cubbage earlier in the evening and also that Cubbage's pocketbook was missing, he decided to go to the dumping ground area. There, he found decedent's purse about 50 yards from where he had seen the car. Later, in the wooded area, certain personal effects of Cubbage were found. (App. 307-14.) Further investigation revealed that Johnson had been out all night with Petitioner. Further, a bloodied floor mat and Sunday newspaper were found in his car. (App. 300-02.)

Subsequently, Chesterfield County investigators went to Petitioner's home in the early afternoon on November 14. Pursuant to a consensual search from Fitzgerald's wife, they recovered the tennis shoes and clothes that had been left behind by Johnson. (App. 349-50.) During this interview, Petitioner returned to the apartment. After consenting to an interview by the police, he was speaking with them when one

officer noticed what appeared to be dried blood and vegetation on Fitzgerald's shoes. He therefore took the shoes from Petitioner as well as his tattoo kit. (App. 351-53). Later, during another search consented to by Mrs. Fitzgerald, he found Petitioner's knife hidden far underneath the kitchen cabinet. (App. 340-43.) Subsequently, after the discovery of decedent's body, Petitioner was arrested and charged with the various offenses.

During his incarceration at the Chesterfield County Jail, he had several conversations with Wilbur Caviness, who was then a trustee. When Caviness asked Petitioner why he had killed Cubbage and cut her up, Fitzgerald responded that "he had screwed her and the pussy was so good to him he cut it out and carried it home to have it to eat." Petitioner further indicated that Cubbage "snitched on him and snitched on a friend of his also." (App. 240.) In this regard, there was evidence that Cubbage had been an informer or "snitch" for the Richmond Police Department. (App. 243.)

After a jury trial, Petitioner was convicted of capital murder, armed robbery, rape, abduction, and breaking and entering. He was given life terms in the penitentiary on all of the non-capital charges. Thereafter, the penalty stage of the trial was conducted. The jury then recommended a sentence of death based on a finding that Petitioner's conduct" in committing the offense [was] outrageously or wantonly vile, horrible or inhuman in that it involved

torture, depravity of mind and aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder...." (App. 534-35.) See 19.2-264.2 of the Code of Virginia (1950), as amended. On September 4, 1981, the trial court imposed the death sentence on the capital murder conviction and life sentences on the other charges.

Petitioner then appealed his convictions to the Supreme Court of Virginia which accorded his case a priority status. On June 18, 1982, the Supreme Court of Virginia affirmed Petitioner's convictions. (Record No. 811669.)

ARGUMENT AGAINST GRANTING CERTIORARI

I.

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ABOUT THE AGGRAVATING FACTORS THAT IT MUST FIND IN ORDER TO SENTENCE PETITIONER TO DEATH.

Petitioner first argues that after the jury had indicated in a question to the trial judge that it had not unanimously found the existence of either of the two aggravating factors in § 19.2-264.2 of the Code of Virginia, the Court failed to take actions sufficient to insure that such unanimity would be present prior to the death sentence being imposed. It is argued that in effect the trial judge directed a verdict of death.

Respondent says that this argument has never been raised on the State level and thus should not be considered by this Court. It is well established that an issue raised for the first time in a petition for a writ of certiorari should not

reviewed by this Court. This principle was illustrated in Cardinale v. Louisiana, 394 U.S. 437 (1969). There, it developed during oral argument before this Court that the one federal question had not been raised, preserved, or passed upon in the State courts below. The Court then dismissed the writ of certiorari for lack of jurisdiction and stated:

> "It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions....The Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions....
>
> Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind. And in a federal system it is important the state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality. Or the issue may be blocked by an adequate state ground."

394 U.S. at 438-39.

It is true that on direct appeal to the Supreme Court of Virginia, petitioner assigned as error that his death sentence was imposed under the influence of passion, prejudice, undue influence, and other arbitrary factors. Further, under § 17-110.1(C)(1), the Supreme Court is required in any capital case to determine whether the death penalty was imposed under the influence of such improper factors. On appeal, petitioner referred to a number of other assigned errors and asserted that these errors had influenced the jury's verdict. Brief of Appellant at 34-35. Nothing remotely comparable to the present argument, however, was advanced on the state

level. In its written opinion, the Supreme Court of Virginia clearly limited its consideration of this error to the contention raised by petitioner on brief. Fitzgerald v. Commonwealth, 223 Va. at 639. It is therefore manifest that the present claim was not considered on the state level. Surely, the fact that the Supreme Court considered the overall contention that arbitrary factors had brought about the death penalty should not be deemed to mean that any and all arguments subsumed within this overall contention are implicitly raised and rejected. If that were the case, then, for example, a hearsay claim that had never previously been propounded could be raised in a petition for a writ of certiorari to this Court on the theory that it had been "implicitly" rejected by the state court. Obviously, such a contention is without merit.

In any event, any claim that the trial court somehow directed the verdict in this case is groundless. During the penalty stage of petitioner's trial, the jury was instructed that in order to sentence him to death it must find beyond a reasonable doubt the existence of at least one of the two statutory aggravating factors. (App. 20.) In the event that it did so find, it could still fix the punishment at life imprisonment. If neither circumstance was established beyond a reasonable doubt, then the jury was required to impose a term of life imprisonment. Then, when the jury returned with a verdict, the trial court made them go back to their room in

order to return a legally sufficient verdict. He clarified the fact that the verdict form should demonstrate whether the jury "found one way or the other way or both. You all will have to decide." (Tr. 940-41.) The jury then returned the second time with a verdict. Again, the trial judge clarified the instruction for the members of the jury. He again informed the jury that it could "find both; one or the other, or you can find both. The way the verdict is written with the or in it, you don't say which one." (Tr. 942.) The jury then returned with a verdict which had crossed out the "future dangerousness" factor and the "and" from the "and/or" portion of the finding instruction. The jury stated that it had found the existence of the "vile" circumstance and thus "unanimously" fixed his punishment at death. Any question regarding the unanimity of the jury about the finding of this factor was eliminated by the polling of the members of the jury. (Tr. 945-46.) Respondent submits that the record therefore demonstrates that no directed verdict occurred in this case, but rather that the jury unanimously found that petitioner's actions were sufficiently "vile" to mandate the imposition of the death penalty.

II.

THE EVIDENCE ADEQUATELY SHOWED THAT PETITIONER RAPED DECEDENT PRIOR TO OR DURING THE COMMISSION OF THE CAPITAL MURDER.

In the present petition, Fitzgerald contends that the evidence was insufficient under Jackson v. Virginia, 443 U.S.

307 (1979), to prove beyond a reasonable doubt that he had raped Patricia Cubbage. The rape and his robbery of her pocketbook were the two underlying felonies rendering the subsequent homicide capital murder under § 18.2-31 of the Code of Virginia. Respondent submits that the evidence was ample to satisfy Jackson, which requires that a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

Petitioner claims that the evidence did not adequately establish his penetration of Cubbage. Johnson testified, however, that in the bedroom at the Henn residence, petitioner told Cubbage that he had "always heard that you were a good fuck and a good piece of ass and I'm going to find out." (App. 176-77.) Johnson then saw Fitzgerald begin to remove his pants. Cubbage stated that she was on her period and had a tampon within. Johnson then turned back and saw the tampon on the bed; Johnson believed that petitioner had removed it from her. (App. 177.) Then, as he turned his head away he heard Cubbage breathing hard and the bed squeaking. He then saw petitioner pull up his pants and tell Cubbage that she was "not worth a fuck." (App. 178.) In addition, the Commonwealth introduced evidence that head hairs "consistent" with the head hairs of Cubbage and a pubic hair "consistent" with the pubic hairs of Fitzgerald had been found on the bed sheet in the decedent's bedroom. (App. 389-92.) When all of the above evidence is considered in conjunction with peti-

tioner's statement to Caviness as to why he had mutiliated Cubbage, it is clear that a rational trier of fact could have concluded that petitioner had in fact penetrated Cubbage.

It is incorrect, as the above evidence demonstrates, to assert that only the testimony of Caviness constituted proof of the rape. It is grotesque to argue that petitioner's explanation for his deeds, as testified to by Caviness, simply showed that he was a misguided humorist or person offended by the question. The absurdity of this contention is shown by the fact that at page 17 of his petition, petitioner complains that Caviness' testimony supplied to the jury "the malignant nature" of petitioner and thereby demonstrated "that he was a man not fit to live."

As part of his attack on the sufficiency of the evidence, petitioner argues that the Commonwealth improperly used Caviness as a surprise witness. Petitioner argues that under the facts of this case, particularly given the fact that this was a capital murder prosecution, this use of Caviness prejudiced his right to due process and to a fair trial. Clearly, however, the improper use of a surprise witness has nothing whatever to do with the sufficiency of the evidence. At no point on appeal did petitioner complain that his constitutional rights had been violated by this testimony. Accordingly, this claim should not be considered by this Court at the present time. See Cardinale v. Louisiana, supra.

Respondent further submits that the present claim is not the sort of issue that should justify the granting of a writ of certiorari. This Court has already held that a petition should not be granted to review evidence and discuss specific facts. See, e.g., United States v. Johnston, 268 U.S. 220 (1925).

III.

THE TRIAL COURT ADEQUATELY DISCHARGED ITS RESPONSIBILITIES CONCERNING THE FACT THAT ONE OF PETITIONER'S TWO TRIAL ATTORNEYS WAS MARRIED TO AN EMPLOYEE IN THE PROSECUTOR'S OFFICE.

Petitioner argues that the trial judge did not adequately discharge his duties when it became known that one of Fitzgerald's two trial attorneys was married to an administrative assistant in the Commonwealth's Attorney's office in Chesterfield County. On July 9, 1981, the trial judge sua sponte advised petitioner of this fact. Petitioner indicated at this time that he was not previously aware of this relationship. He subsequently stated, however, that he was satisifed with the representation of the attorney, Fred S. Hunt, III. Five days later, on July 14, 1981, at the outset of the trial, petitioner stated that he was still satisfied with his attorneys' services. He further indicated that he was satisfed that everything that should have been done had in fact been done in preparation for his trial. (App. 101.) Finally, he answered "no" when asked if there was anything he wished to ask the trial judge regarding these

procedures or his rights. (App. 102.) At a post-trial hearing on December 8, 1981, petitioner requested new counsel on the ground that no one had "told me from the start that Mr. Hunt's wife works for the Commonwealth's attorney. Therefore, I do not believe he is a partial [sic] lawyer." (App. 547-C.) Pursuant to this request, new counsel were appointed for petitioner on appeal to the Supreme Court of Virginia.

Respondent submits that as a matter of law this record reflects no conflict of interest. Certainly, it was not in Hunt's personal interest to lose this case. As a private attorney seeking new business, he derived no pecuniary or other benefit from Fitzgerald being convicted in this well publicized case. In effect, petitioner is arguing that Hunt could not properly serve as a defense attorney in any criminal case in Chesterfield County. Respondent is aware of no case law supporting such an untenable argument. Further, as the State Supreme Court noted on appeal, rather than Hunt's marriage harming Fitzgerald, it would be "more logical to believe that Hunt might obtain from his wife information that would be of assistance to him in defending Fitzgerald." 223 Va. at 638.

This Court stated in Cuyler v. Sullivan, 446 U.S. 335 (1980), that normally a trial judge "may assume either that multiple representation entails no conflict or that the lawyer and his clients knowingly accept such risk or conflict

as may exist....Unless the trial court knows or reasonably should know that a particular conflict exists, the court need not initiate an inquiry." 446 U.S. at 347. The Court also held that a defendant who made no objection at trial "must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." Id. at 348. He could not simply point to the mere possibility of a conflict.

In the instant case, Fitzgerald raised no objection until months after his trial. Likewise, his lawyer, who is not alleged to have acted in bad faith, raised no question. Under these circumstances, the trial judge did something that was not mandatory under Cuyler -- on his own initiative he broached the matter of the marital relationship. Petitioner has pointed to nothing in the record that would show Hunt in any way "actively represented conflicting interests...." 446 U.S. at 350. The mere allegation that potential conflict of interests existed is inadequate to establish such a conflict.

Respondent further submits that Wood v. Georgia, 450 U.S. 261 (1980), which is relied upon by petitioner, is readily distinguishable from this case. In Wood v. Georgia, throughout the criminal proceedings the three defendants were represented by one attorney, who at all times was paid by their employer. Emphasizing the particular facts of the case, the Supreme Court held that a conflict of interests was strongly suggest[ed]" by the record. 450 U.S. at 273. In this factual context, where so many of the actions of the

attorney appeared to be intended more for the benefit of the employer rather than his clients, the trial court had an obligation to make a further inquiry. Id. at 272.

In contrast, the record in the present case reveals no such strong possibility of a conflict of interests. On the contrary, the record establishes, and petitioner does not assert to the contrary, that Hunt at all times vigorously sought to defend him. Respondent would further point out that at all stages of the trial petitioner was represented by a second attorney, Harold W. Burgess, Jr. The record demonstrates that he was actively involved in the defense of Fitzgerald. For example, he cross-examined the medical examiner and an expert witness for the prosecution and conducted the direct examination of a psychiatrist testifying on behalf of petitioner. He was also active in the preparation of the jury instructions and made several motions. (App. 504-C through 504-D, 507-10.) Cf. Durham v. Blankenship, 461 F.Supp. 492 (W.D. Va. 1978), dismissed without opinion, 609 F.2nd 506 (4th Cir. 1979) (no conflict of interest where co-counsel had undertaken "active and substantial role" in defense).

Finally, respondent states that the present claim has been waived by petitioner. Five days after being informed by the trial judge as to Hunt's marital status, he answered affirmatively when asked if he was still satisifed with his representation. He further stated that he had no questions

regarding any of his rights. A defendant must show "'that he did not knowingly and voluntarily waive his right to conflict-free representation.'" O'Kelley v. State of North Carolina, 606 F.2d 56, 57 (4th Cir. 1979). Here, petitioner was advised sufficiently prior to trial of his attorney's marital status. His later statement at trial that he was satisifed with Hunt's services should be regarded as a waiver of the present contention.

CONCLUSION

For the reasons presented, the respondent respectfully contends that the issues raised in this case are neither important nor substantial and ask this Court to deny the petitioner for a writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I, Robert H. Anderson, III, Assistant Attorney General of Virginia, am a member of the Bar of the Supreme Court of the United States, and on the 7th day of January, 1983, I mailed, with first class postage prepaid, a copy of the Respondent's Brief in Opposition to Granting of Writ of Certiorari to Bradley S. Stetler, Esquire, 419 Seventh Street, N.W., Suite 202, Washington, D.C., 20004, counsel for petitioner.

Robert H. Anderson, III
Assistant Attorney General